No. 07-891

2-15-08

In The

Supreme Court of the United States

NANCY ALEXANDER, et al.,
Petitioners,

v.

BOSCH AUTOMOTIVE SYSTEMS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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STATEMENT REGARDING THE PARTIES TO THE PROCEEDING

In its Brief in Opposition, the Respondent states, "The correct legal name of Respondent is Bosch Automotive Motor Systems, Inc. . . . Neither Respondent nor its parent is a publicly-traded company."

To avoid any investment conflict: Bosch Corporation is a publicly-traded stock in Germany, trading in Germany under the name (translated into English) "Bosch Automotive Systems, Inc." In 2000, Zexel Corp. merged into the Bosch Group of companies and was renamed, in English, "Bosch Automotive Systems, Inc." Following that merger, "Bosch Automotive Systems, Inc." is still publicly traded in Germany under the symbols ZEX.BE, ZEX.MU, ZEX.F, and ZEX.DE, depending on whether the stock is traded on the Berlin, Munich, Frankfurt, or Germany-wide markets.

It should be noted that Bosch's attorneys signed their pleadings in the district court below as "Attorneys for Bosch Automotive Systems, Inc." and in the appellate court as "Attorneys for Appellant Bosch Automotive Systems."

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ARGUMENT

I. THE COURT WAS ABUNDANTLY CLEAR REGARDING THE ISSUE PRESENTED IN *VARITY CORP. v. HOWE.*

In its Brief in Opposition, the Respondent writes, "Petitioners misrepresent *Varity*. The *Varity* Court did not conclude that reinstatement to benefits constituted 'appropriate equitable relief' under 502(a)(3). The issue was never considered by the Court because the appropriateness of the remedy had been conceded by the parties." Brief in Opposition at 3-4. In support of this argument, the Respondent quotes the Court from *Varity*: "'Varity conceded that the plaintiffs satisfy most of [502(a)(3)]'s requirements, namely, that . . . they are suing for 'equitable relief' to 'redress' a violation of . . . a 'provision of this title.' 516 U.S. at 508. Brief in Opposition at 4, n. 3 (bracket added by Respondent for clarity).

The Respondent's argument regarding the reach of this Court's decision in *Varity Corp.*, 516 U.S. 489 (1996), is belied by a single sentence in *Varity Corp.*, which was omitted from Respondent's "supporting" quotation. In its quotation of the Court from *Varity Corp.*, Respondent omitted the Court's very next sentence, in which the Court explained: "Varity does not agree, however, that this lawsuit seeks equitable relief that is 'appropriate.'" 516 U.S. at 508. As should be clear from the Court's <u>full</u> quotation, it is undeniable that the Court in *Varity Corp.* did confront, to use the words of the Respondent, "the appropriateness of the remedy" of reinstatement to benefits under ERISA.

Based on the numerous statements of the Court (quoted in the Petition at 11-13) in *Varity Corp.*, outlining the issue presented and the holding of the Court in that case, and based on the Court's simple explanation of the argument made by Varity Corporation, which the Respondent has inexplicably truncated in its Brief in Opposition, the Court was clearly confronted in *Varity Corp.* with the question of whether reinstatement to benefits is an appropriate form of relief under ERISA. The Court directly held -- contra to the decision of the court of appeals below -- that reinstatement to benefits is an appropriate ERISA remedy. *Varity Corp.*, 516 U.S. at 508, 515.

II. THE NINTH'S CIRCUIT'S DECISION IN *MATHEWS v. CHEVRON* IS CLEARLY IN CONFLICT WITH THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE.

In its Brief in Opposition, the Respondent considers the Ninth Circuit's decision *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004), to "warrant" no more than "a brief word." Brief in Opposition at 8. The Respondent then, without citation, asserts that the Ninth Circuit in *Mathews* merely "affirmed a 502(a)(3) remedy ordering the employer/fiduciary to amend certain plan records." And, "Critical to the court's conclusion in *Mathews* was its recognition that the record amendment would not guarantee benefits." *Id.*

The Respondent's unsupported statements regarding the Ninth Circuit's decision in *Mathews* are completely contradicted by the actual words of the Ninth Circuit. The Ninth Circuit did not merely affirm an order that Chevron "amend certain plan records,"

nor did the Ninth Circuit ever "recognize" that Chevron's compelled actions "would not guarantee benefits." Instead, in *Mathews*, the Ninth Circuit required that Chevron amend its plan's records specifically "to ensure that [the plaintiffs] are provided the SITE benefit in accordance with said change." *Mathews*, 362 F.3d at 1186.

The Respondent's treatment of the split between the Sixth Circuit in this case and the Ninth Circuit in *Mathews* is noticeably meager, and curious, in light of the Respondent's encomiums for the Sixth Circuit's view that the district court's remedy in this case was "instatement to benefits" not "reinstatement to benefits." See Brief in Opposition at 6. In *Mathews*, the Ninth Circuit, relying on the Court's decision in *Varity Corp.*, specifically concluded, "If 'reinstating' employees into a plan constitutes 'appropriate equitable relief,' there is no reason to conclude that 'instating' them would not." *Mathews*, 362 F.3d at 1186. The division between the Sixth Circuit and the Ninth Circuit on this issue could not be clearer.

Finally, the Respondent's effort to minimize the Ninth Circuit's decision in *Mathews*, by describing Respondent's Westlaw search results and characterizing the Ninth Circuit's decision as a "lone opinion" that "does not create a 'circuit split,'" Brief in Opposition at 9, is notable for another omission by Respondent. In the Petition, Petitioners cite the Third Circuit's decision, *Leckey v. Stefano*, 501 F.3d 212 (3rd Cir. 2007), along with *Mathews*, as examples of one side of the split among the courts of appeals regarding the proper remedies available under Section 502(a)(3). Petition at 15. (In *Leckey*, 501 F.3d at 230, the Third

Circuit held that remand to the district court in that case was appropriate because "equitable relief in the form of a constructive trust is available" to ERISA plaintiffs under 502(a)(3), even though such a remedy would necessarily require the payment of money to the plaintiffs.) The Respondent's effort to minimize the clear split between the decision of the Sixth Circuit in this case and the Ninth Circuit in *Mathews* is, unfortunately, bolstered only by Respondent's failure to mention or discuss the Third Circuit's *Leckey* decision. The Third Circuit's decision is in agreement with the Ninth Circuit's decision in *Mathews*, and the conflict between the Third & Ninth Circuits and the other courts of appeals, discussed in the Petition at 13-15, is palpable. The disagreement among the courts of appeals regarding the remedies available under 502(a)(3) is certainly not the product of a "lone opinion."

III. THE COURT'S GRANT OF CERTIORARI TO REVIEW THE 502(a)(3) ISSUE IN *LARUE* WAS HARDLY AN AFTERTHOUGHT.

Respondent argues that the Court's pending decision in *LaRue v. DeWolff, Boberg & Assoc., Inc.*, is "not relevant to" the Petition in this case. Brief in Opposition at 9. In support of that assertion, Respondent argues that "the focus" of the Court in *LaRue* is the Section 502(a)(2) issued presented in that case. *Id.* Respondent then asserts, again without argument, support, or citation, that the 502(a)(3) issue that the Court also granted certiorari on in *LaRue* "was at best a secondary issue thrown in as an afterthought." *Id.* at 10.

Respectfully, the Petitioners do not believe that the Court thoughtlessly "threw in" issues into its grant of certiorari in *LaRue*. Instead, it appears to Petitioners that the Court granted certiorari to review the 502(a)(3) issue in *LaRue* precisely because the Court deemed that issue worthy of review, particularly to resolve the existing division among the courts of appeals and/or to clarify the apparent discrepancy between the Court's decisions in *Varity Corp.* and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

As discussed in the Petition, the Court may not reach the 502(a)(3) issue presented in *LaRue*. To the extent that the Court deems it inappropriate, in *LaRue*, to resolve the current circuit split and clarify the remedies available under 502(a)(3), this case provides an excellent opportunity for the Court to clarify the correct interpretation of 502(a)(3). Moreover, this case is a particularly good case to resolve any conflict between *Varity Corp.* and *Great-West*, because the remedy in this case is the same as in *Varity Corp.* Resolution of this case will let courts, counselors, commentators, and Congress know whether *Great-West* actually effected a reinterpretation of 502(a)(3).

CONCLUSION

The petition for writ of certiorari should be granted. The writ should issue, and the Court should resolve the split among the courts of appeals by deciding this case on the merits. In the alternative, and to the extent that the Court clarifies the proper interpretation of Section 502(a)(3) in *LaRue*, the Court

should issue the writ, vacate the judgment below, and remand this case to the court of appeals for reconsideration in light of *LaRue*. In either event, the petition should be granted.

Respectfully submitted.

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